IN THE

Supreme Court of the United States

No. 70-5004

DONALD GILBERT HUMPHREY,
Petitioner,

v.

ELMER O. CADY, Warden,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

IRVIN B. CHARNE
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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OPINIONS BELOW

The Order of the Honorable Thomas E. Fairchild, Circuit Judge, and the Honorable Walter J. Cummings, Circuit Judge of the United States Court of Appeals for the Seventh Circuit is not reported (A. 57-58). The Opinion and Order of the United States District Court for the Eastern District of Wisconsin, is not reported (A. 42-44).

JURISDICTION

The Order of the Honorable Thomas E. Fairchild, Circuit Judge, and the Honorable Walter J. Cummings, Circuit Judge, of the United States Court of Appeals for the Seventh Circuit was entered on May 12, 1970. The petition for a writ of certiorari, filed on July 6, 1970, was granted on March 22, 1971. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1651, and upon *House v. Mayo, State Prison Custodian,* 324 U.S. 42 (1945).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Section 1, Amendment XIV of the Constitution of the United States; the Wisconsin Sex Crimes Act, section 959.15, Wis. Stats. (1967); and relevant provisions of the Mental Health Act, chapter 51, Wis. Stats. (1967). The pertinent provisions thereof are set forth in full in the Appendix to this brief.

QUESTIONS PRESENTED

The Wisconsin Sex Crimes Act, section 959.15, Wis. Stats. (1967), establishes a procedure for the commitment of a defendant following: (1) His conviction of one of the crimes specified in section 959.15(1), Wis. Stats. (1967); or (2) His conviction of any other crime, except homicide or attempted homicide, where the judge finds that the defendant was motivated by a desire for sexual excitement in the commission of the crime.

If, at the expiration of the maximum term prescribed by law for the offense for which the defendant was committed, the Department of Health and Social Services believes that the release of the defendant would be dangerous to the public, it may request an extension of control over the defendant for an additional five year period. Subsequent, additional five year extensions may also be requested by the Department.

While one is afforded a hearing at his original commitment and at each extension hearing under the Sex Crimes Act, he is, at both hearings, denied the right to demand a trial by jury.

The Sex Crimes Act further provides that one who is committed to the Department pursuant to its terms may not demand a judicial re-examination of his mental condition during the term of his original commitment. During any periods of extension, one may apply for re-examination at six-month intervals.

After being committed to the Department for specialized treatment, the petitioner was confined in the Wisconsin State Prison.

The Wisconsin Mental Health Act, chapter 51, Wis. Stats. (1967), provides for the commitment of persons found to be mentally ill, infirm or deficient.

Following commitment, one may demand judicial re-examination of his mental condition at any time, provided, however, that such re-examination may not be compelled within one year of the prior re-examination.

At the original commitment and at any re-examination one may demand a trial by a six-man jury.

No person committed under the Mental Health Act can be confined in the Wisconsin State Prison.

The questions presented are: (1) Whether the Sex Crimes Act's denial of a jury trial at both the original commitment and the extension and re-examination hearings denied petitioner equal protection of the laws, when this right is guaranteed under the Mental Health Act; (2) Whether the Sex Crimes Act's limitation upon one's right to demand a judicial re-examination of his mental condition denied petitioner equal protection of the laws, when no such limitation appears in the Mental Health Act; (3) Whether the confinement of the petitioner in the Wisconsin State Prison denied him equal protection of the laws, when no person committed under the Mental Health Act could have been so con-

fined; (4) Whether the denial of a jury trial by the Sex Crimes Act at both the original commitment and at the continuation hearing is a denial of due process of law; (5) Whether the denial of the right of one committed under the Sex Crimes Act to challenge whether he is within the purview of the act is a denial of due process of law; and (6) Whether the petitioner was, in fact, denied legal representation at his continuation hearing under the Sex Crimes Act.

STATEMENT OF THE CASE

On May 30, 1967, the petitioner was arrested for contributing to the delinquency of a child in violation of section 947.15(1)(a), Wis. Stats. (1967). The following day the petitioner, being represented by court-appointed counsel, pleaded guilty to the charge.

Upon a finding by the trial judge that the petitioner was motivated by a desire for sexual excitement in the commission of the crime, the petitioner was committed to the State Department of Public Welfare (now known as the Department of Health and Social Services, and hereinafter referred to as the "Department") for a presentence social, physical and mental examination, pursuant to the Sex Crimes Act, section 959.15(2), Wis. Stats. (1967).

Upon the recommendation of the Department that the petitioner was in need of specialized treatment for his mental aberrations, the petitioner was, on July 24, 1967, committed to the Department pursuant to section 959.15(6), Wis. Stats. (1967). At the time of the commitment, the petitioner appeared in court without counsel and no hearing was held.

Following his commitment to the Department, the petitioner was incarcerated in the Wisconsin State Prison at Waupun, Wisconsin. While confined in the State Prison, the petitioner lived like and with all other prisoners and was subject to the same rules. (A. 36).

In an Order dated April 1, 1968, the Department stated that the discharge of the petitioner on July 24, 1968, would be dangerous to the public, and requested that the petitioner remain subject to the control of the Department beyond that date pursuant to section 959.15(12), Wis. Stats. (1967). The Department applied for review of its Order requesting continued control over the petitioner on April 1, 1968.

On July 23, 1968, the review of the Department's Order came on for hearing before the County Court for Waukesha County, Wisconsin. On advice of his court-appointed counsel, the petitioner refused to submit to an examination by a doctor or psychiatrist of his own choosing prior to the hearing. (A. 32) Upon request of the petitioner's attorney, the hearing was adjourned so that she could file a brief raising constitutional objections to the petitioner's continuation. (A. 33-34) As no brief or other correspondence was received by the court from the petitioner's attorney, the Order of the Department was confirmed by the court on November 26, 1968 (A. 14-15)

A petition for habeas corpus by the petitioner was received and submitted to the Wisconsin Supreme Court on July 25, 1969. This petition was denied on October 9, 1969.

The petitioner filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Wisconsin on October 22, 1969. After ordering a response to the petition, the district court entered an Opinion and Order on December 3, 1969, denying the petition and the petitioner's request for an evidentiary hearing and the appointment of counsel.

On December 22, 1969, the petitioner filed a notice of appeal and an application for a certificate of probable cause. The application for a certificate of probable cause was denied by the district court on Decmeber 31, 1969.

On April 24, 1970, a motion to proceed in forma pauperis and a petition for a certificate of probable cause was

filed with the United States Court of Appeals for the Seventh Circuit by the petitioner. On May 12, 1970, an Order denying the petition for a certificate of probable cause was entered.

A petition for a writ of certiorari to review the Order dated May 12, 1970, was filed by the petitioner on July 6, 1970. The petitioner's motion to proceed in forma pauperis and his petition for a writ of certiorari were granted by this Court on March 22, 1971. On April 26, 1971, this Court appointed Irvin B. Charne to represent the petitioner.

SUMMARY OF ARGUMENT

I.

This Court's holding in *House v. Mayo*, 324 U.S. 42 (1945), permits the review of the district court's decision on the merits, even though that decision was not reviewed by the court of appeals.

II.

The Wisconsin Mental Health Act, Chapter 51, Wis. Stats. (1967), provides for the commitment of persons found to be mentally ill, infirm or deficient. Following the receipt of a written application requesting the mental examination of any person, and the subsequent examination by two physicians, this Act affords a patient a hearing to protest and oppose the proceedings and his commitment. At this hearing, the patient is afforded the right to demand trial by a six man jury.

Following commitment, the patient is confined in a hospital or training school. If found to be dangerous, the patient may be transferred to the Central State Hospital.

Persons committed under the Mental Health Act may demand a judicial reexamination of their mental condition at any time after their initial commitment. However, subsequent reexaminations may not be compelled within one

year of the preceding examination. The procedure at the hearing on the patient's reexamination, is the same as that at the initial commitment, including the right to demand a jury trial.

The Wisconsin Sex Crimes Act, section 959.15, Wis. Stats. (1967), establishes a procedure for the commitment of a defendant following: (1) his conviction of one of the crimes specified in section 959.15(1), Wis. Stats. (1967); or (2) his conviction of any other crime, except homicide or attempted homicide, where the judge finds that the defendant was motivated by a desire for sexual excitement in the commission of the crime.

If, at the expiration of the maximum term prescribed by law for the offense for which the defendant was convicted, the Department of Health & Social Services believes that the release of the defendant would be dangerous to the public, it may request an extension of control over the defendant for an additional five year period. Subsequent, additional five year extensions may also be requested by the Department.

While one is afforded a hearing at his original commitment and at each extension hearing under the Sex Crimes Act, he is denied the right to demand a trial by jury.

The Sex Crimes Act further provides the one who is committed to the Department pursuant to its terms may not demand a judicial reexamination of his mental condition during the term of his original commitment. During any periods of extension, one may apply for reexamination at six month intervals.

III.

The commitment and extension proceedings under the Sex Crimes Act must be determined to be either civil or criminal. If civil in nature, the petitioner was denied rights guaranteed to persons committed under the Mental Health

Act. As there is no relevant distinction for purposes of classifications between persons committed under the Sex Crimes Act and those committed under the Mental Health Act, the petitioner was denied equal protection of the laws. If the proceedings under the Sex Crimes Act are criminal in nature, the petitioner was, in addition to being denied equal protection of the laws, denied due process of law.

IV.

Commitment proceedings under the Sex Crimes Act are subject to the protections of both the equal protection clause and the due process clause. The commitment of the petitioner under the Sex Crimes Act, however, denied him equal protection of the laws.

Persons committed under the Sex Crimes Act are denied rights guaranteed to those committed under the Mental Health Act. While the Sex Crimes Act denies one the right to demand a trial by jury at the original commitment proceeding and at all continuation and reexamination hearings, a jury trial is expressly guaranteed under the Mental Health Act at all hearings concerning one's mental condition.

Similarly, the Mental Health Act affords one the right to demand a judicial reexamination of his mental condition at any time subsequent to commitment, while, under the Sex Crimes Act, this right is severely limited.

The statutory provisions of the Mental Health Act further define that those committed pursuant to its terms shall be confined in a mental hospital or training school. The petitioner, however, who was committed under the Sex Crimes Act to receive specialized treatment for his mental aberrations, was confined in the Wisconsin State Prison.

The denial to those committed under the Sex Crimes Act of each of the above rights constitutes a deprivation of equal protection of the laws, unless there exists a distinction relative to the purposes of classification between those committed under the Mental Health Act and those com-

mitted under the Sex Crimes Act. No such distinction exists.

The fact that the mental state or condition which justifies commitment under the Mental Health Act is more strictly defined than that under the Sex Crimes Act, does not constitute a distinction which justifies the denial of procedural rights to persons committed under the Sex Crimes Act. A distinction as to the nature of the mental infirmity is irrelevant. The question is whether one is suffering from the mental infirmity defined by statute, which infirmity justifies commitment.

While one may only be committed under the Sex Crimes Act after the conviction for a "sex crime," this distinction between the acts is also not a relevant distinction for purposes of classification. *Baxstrom v. Herold,* 383 U.S. 107 (1966).

The determination at the continuation hearing that the release of the defendant would be dangerous to the public, is, similarly, not a relevant distinction between those committed under the Sex Crimes Act and those committed under the Mental Health Act. The decision of the Wisconsin Supreme Court that dangerousness was a relevant distinction, is in direct conflict with this Court's holding in *Baxstrom v. Herold, supra.* The question presented by the petitioner is not whether dangerousness is a proper classification for purposes of continued confinement, but whether procedural rights guaranteed to all others may arbitrarily be withheld from those determined by the court to be dangerous.

V.

The petitioner was denied due process of law at his continuation hearing when he was: (1) not afforded a trial by jury; and (2) not afforded competent legal representation.

This Court's holding in *Duncan v. Louisiana,* 391 U.S. 145 (1968), requires that the right to a jury trial must be

insured at all criminal proceedings at which a severe penalty might be imposed. Decisions of both the Wisconsin Supreme Court and the United States District Court for the Western District of Wisconsin have concluded that commitment proceedings under the Sex Crimes Act are independent criminal proceedings. These decisions are in accord with this Court's holding in *Specht v. Patterson*, 386 U.S. 605 (1967).

As commitment under the Sex Crimes Act subjects one to enlarged punishment up to and including the possibility of life imprisonment, the commitment and continuation hearings are proceedings at which a severe penalty may be imposed. Various courts have held that commitment under acts similar to the Wisconsin Sex Crimes Act resulted in punishment that required the safeguards of due process to be afforded at all stages of the proceedings.

As commitment proceedings under the Sex Crimes Act are independent criminal proceedings at which a severe penalty may be imposed, due process requires that one be afforded a trial by jury.

Petitioner was further denied due process of law at his continuation hearing because he was not afforded competent legal representation. The transcript of the petitioner's continuation hearing and the order of the court confirming the extension, clearly show that the petitioner was afforded representation of such low quality that it constituted no representation at all.

VI.

The Sex Crimes Act makes no provision for one to challenge the determination that he is within the purview of the act. Unless one is convicted of one of the crimes specified in section 959.15(1), Wis. Stats. (1967), he may not be committed pursuant to the Sex Crimes Act unless the judge determines that the defendant was motivated by a desire for sexual excitement in the commission of the crime.

However, such a finding is left solely in the hands of the judge with no right of the defendant to introduce evidence bearing on that decision. The critical importance of this determination is evidenced by the fact that it enlarged the potential term for which the petitioner could have been confined from one year to life. The denial to the petitioner of the right to challenge the judge's decision concerning the motivation for the commission of the crime constitutes a denial of due process of law.

Because the Sex Crimes Act denies the right to a trial by jury on its face, the act must be declared unconstitutional as a violation of due process of law.

Therefore, the petitioner's petition for a writ of habeas corpus should be granted, and the Sex Crimes Act should be declared to be unconstitutional.

ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE REVIEWED ON THE MERITS.

This Court may review the decision of the district judge on the merits even though that decision was never reviewed by the court of appeals. In a case procedurally similar to the present matter, this Court held that it would review the merits of a district court decision on a writ of certiorari even though the absence of a certificate of probable cause prevented that case from being considered by the court of appeals.

> By virtue of that section [28 U.S.C. sec. 1651] we may grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it. [citation omitted] And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends also

to the questions on the merits sought to be raised by the appeal. [citations omitted] We hold that the same principles are applicable here: Hence we are brought to the question whether the district court rightly denied the petition. *House v. Mayo*, 324 U.S. 42, 44-45 (1945).

II.

CONFLICTING STATUTORY PROVISIONS INVOLVED.

The determination of the questions presented to this Court require knowledge of the Wisconsin statutory procedures for the commitment of persons suffering from a mental abnormality. A brief review of the statutory provisions relevant to the petitioner's argument follows.

A. The Wisconsin Mental Health Act.

The Wisconsin Mental Health Act, Ch. 51, Wis. Stats. (1967), provides the statutory basis for the civil commitment of mentally ill, infirm or deficient persons. The commitment procedure is instituted by the written application of at least three adult residents of the state requesting the mental examination of any person. Section 51.01(1), Wis. Stats. (1967).

Upon receipt of the application, two physicians are appointed by the court to personally observe and examine the patient. Following their examination they are required to file an affidavit stating that the patient is, or is not, mentally ill, infirm or deficient, and whether he is, or is not, a proper subject for custody and treatment. Sections 51.01 (2) and (4), Wis. Stats. (1967).

When the physicians' report is received, and upon notice to the patient, a hearing is held to afford the patient the right to protest and oppose the proceedings and his commitment. Section 51.01(2), Wis. Stats. (1967).

Upon the demand of the patient, or any relative or friend of the patient in his behalf, the questions of whether the

patient is mentally ill, infirm or deficient and, if so, whether he should be confined for treatment will be decided by a six-man jury. Section 51.03, Wis. Stats. (1967).

The court must order the patient discharged or committed in accordance with the jury verdict. Section 51.02 (5)(d), Wis. Stats. (1967).

Following commitment, the patient is confined in a hospital for the mentally ill or infirm, or, if found to be mentally deficient, in the northern or southern colony and training school. Section 51.05, Wis. Stats. (1967). If, after confinement as provided in section 51.05, the patient is determined to be dangerous to himself, to others or to property; or if the public welfare requires it, the patient may be transferred to the Central State Hospital. Section 51.21(2), Wis. Stats. (1967).

Any person committed under the Mental Health Act may have a re-examination of his mental condition at any time after his initial commitment by filing a verified petition in any court of record. Subsequent re-examination may not be compelled within one year of the preceding examination, but may be had at any time in the discretion of the court. Section 51.11(8), Wis. Stats. (1967).

The procedure for any re-examination hearing is the same as that for the initial commitment, section 51.11(4), Wis. Stats. (1967), including the patient's right to demand a jury trial. If a jury trial is demanded, the court's order shall be in accordance with the jury verdict. Section 51.11(5), Wis. Stats. (1967).

B. The Wisconsin Sex Crimes Act.

Section 959.15, Wis. Stats. (1967), commonly referred to as the Sex Crimes Act, establishes a procedure for the commitment of a defendant following his conviction for a sex crime.

If an offender is convicted of one of the crimes specified in section 959.15(1), Wis. Stats. (1967), he must be committed to the Department for a 60-day presentence examination. Upon the conviction of any other crime where the judge concludes that the offender was probably directly motivated by a desire for sexual excitement in the commission of the crime, the defendant may be committed for a presentence examination. Section 959.15(2), Wis. Stats. (1967).

If the Department does not recommend specialized treatment for the defendant's mental aberration, he is sentenced in the manner prescribed by law. Section 959.15(5), Wis. Stats. (1967).

If specialized treatment is recommended, a hearing is afforded the defendant to contest his need for specialized treatment. *Huebner v. State*, 33 Wis. 2d 505 (1967). The defendant is not entitled to a trial by jury at this hearing.

If the court determines that the defendant is in need of specialized treatment, he is committed to the Department for inpatient or outpatient treatment. Section 959.15(6), Wis. Stats. (1967).

Following commitment, the Department has complete control over the defendant, and may confine him until the maximum term prescribed by law for the offense for which the defendant was convicted has expired. Section 959.15 (12), Wis. Stats. (1967). If, at the expiration of this maximum term, the release of the defendant is considered dangerous to the public by the Department, the Department may request an extension of control over the defendant for such additional five year periods, as are determined by the Department to be necessary for the protection of the public. Section 959.15(13) and (15), Wis. Stats. (1967).

A hearing on the request of the Department for extended control is guaranteed to the defendant. However, the defendant is expressly denied a trial by jury. Section 959.15 (14), Wis. Stats. (1967).

During any periods of extended control, the defendant may apply for re-examination at six-month intervals. Section 959.15(15)(c), Wis. Stats. (1967). Trial by jury is also denied at all re-examination hearings.

Briefly stated, the Sex Crimes Act provides for three separate and distinct hearings:

(1) The original commitment hearing which considers only the questions of whether the defendant is suffering from a mental aberration, and, if so, whether he needs specialized treatment.

(2) The continuation hearing at which the new question of the defendant's dangerousness is introduced. It is the finding of this fact, and this fact only, that authorizes extended control over the defendant.

(3) A re-examination hearing, which is afforded only during a period of extended control. At this hearing the defendant raises the question of whether he has recovered sufficiently from his mental aberration to justify his release.

Other relevant provisions of the Sex Crimes Act will be referred to in the argument.

III.

CHARACTERIZATION OF PROCEEDINGS UNDER THE SEX CRIMES ACT AS EITHER CIVIL OR CRIMINAL IN NATURE

The proceedings under the Sex Crimes Act must be characterized as either civil or criminal in nature. Presently, this characterization presents the state with a dilemma; for, if the proceedings are characterized as civil in nature, the petitioner was denied equal protection of the laws for the reasons stated in the argument below. If, on the other hand, the proceedings under the Sex Crimes Act are characterized as criminal in nature, the petitioner was, in addition to being denied equal protection of the laws, denied due process of the law.

Petitioner contends that commitment and extension proceedings under the Sex Crimes Act must be denominated

by this Court as either civil or criminal in nature, with all respective rights incidental thereto guaranteed. These proceedings cannot be characterized as civil in nature so as to avoid the requirements that the Due Process Clause makes essential to all criminal proceedings, and simultaneously, be called criminal in nature when one attempts to invoke the Equal Protection Clause to afford himself of rights guaranteed under the Mental Health Act.

IV.

THE PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAWS.

Section 1 of the Fourteenth Amendment to the Constitution of the United States guarantees to all citizens of the United States that, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In essence, this section provides that all rights, privileges, and immunities granted to any group of persons, must be made equally available to all other persons within that class. Classification of members of a larger class into smaller groups is not permitted, unless such classification is founded upon a reasonable basis.

As this Court held in *Specht v. Patterson*, 386 U.S. 605, 608 (1967), when considering the Colorado Sex Offenders Act which provided for commitment proceedings similar to the Wisconsin Sex Crimes Act:

> These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom v. Herold*, 383 U.S. 107, and to the Due Process Clause.

Thus, the petitioner was guaranteed equal protection of the laws in all proceedings against him under the Sex Crimes Act.

A. Commitment Under the Sex Crimes Act Denied Petitioner Rights Guaranteed to Other Citizens.

Commitment under the Sex Crimes Act denied the petitioner: (1) The right to a jury trial at the original commitment proceeding and at the continuation hearing; (2) The right to demand a re-examination hearing prior to the expiration of the maximum sentence provided by law for the crime petitioner was convicted of; and (3) The right to be confined in a mental hospital for specialized treatment. Each of these rights in specifically guaranteed by statute to persons civilly committed under the Mental Health Act.

1. *Denial of the right to a trial by jury at the original commitment proceeding and at the extension hearing denied petitioner equal protection of the laws.*

The denial to the petitioner of the right to a jury trial at both the original commitment proceeding under the Sex Crimes Act, and at the continuation proceedings held at the expiration of the maximum term prescribed by law for the offense for which the petitioner was convicted, denied the petitioner rights guaranteed to all other citizens of Wisconsin subject to commitment proceedings.

While a hearing on his original commitment under the Sex Crimes Act was not guaranteed the petitioner by statute, in *Huebner v. State, supra,* the Wisconsin Supreme Court held that due process required such a hearing, and that the statutory procedures established for continuation hearings in section 959.15(14), Wis. Stats. (1967), were applicable. These procedures specifically deny one the right to a jury trial.

While persons committed pursuant to the Sex Crimes Act are denied a jury trial to determine the propriety of their original commitment, all persons committed under the provisions of the Mental Health Act, Ch. 51, Wis. Stats. (1967), are expressly guaranteed the right to trial by a six-man jury. Section 51.03, Wis. Stats. (1967), which sets

forth the form of the verdict to be submitted to the jury, provides that the jury shall decide both: (1) Whether the patient is mentally ill, infirm or deficient; and, if so, (2) Whether the patient is a proper subject for custody and treatment. The court must order the patient discharged or committed in accordance with the jury verdict. Section 51.02(5)(d), Wis. Stats. (1967).

Similarly, the petitioner was denied the right to a trial by jury at his continuation hearing. Section 959.15(14), Wis. Stats. (1967). At the same time, section 51.11, Wis. Stats. (1967), permits one adjudged mentally ill, infirm or deficient under the Mental Health Act to demand a re-examination of his mental condition at any time subsequent to his original commitment. Unless waived by the patient, a jury at the re-examination hearing will determine whether the patient is mentally ill, infirm or deficient and whether he should be confined for treatment. Section 51.11(5), Wis. Stats. (1967).

2. *The statutory denial of the right to a re-examination of his mental condition prior to the expiration of the maximum term prescribed by law for the offense for which petitioner was convicted, denied petitioner equal protection of the laws.*

Section 959.15(14)(c), Wis. Stats. (1967), allows one confined under the Sex Crimes Act to apply for a re-examination of his mental condition during his period of extended control, but not more often than semi-annually. The re-examination proceeding is conducted in the same manner as the original commitment proceeding and the continuation hearing. However, the Sex Crimes Act prohibits one committed pursuant to its terms from demanding a judicial re-examination of his mental condition prior to the expiration of the maximum term prescribed by law for the offense for which he was convicted. If, for purposes of illustration, one were convicted of rape and subsequently committed to the Department, he would be precluded from

demanding a re-examination of his mental condition for thirty years.

The Mental Health Act, on the other hand, allows one to demand a re-examination of his mental condition at any time subsequent to his initial commitment, provided, however, that subsequent re-examinations may not be compelled more frequently than once a year. Section 51.11, Wis. Stats. (1967).

With the need for specialized treatment being the justification for one's original commitment under the Sex Crimes Act, the petitioner submits that the maximum term prescribed by law for the offense for which he was convicted is completely unrelated to that justification, and does not, therefore, constitute a reasonable basis for classification.

3. *Confinement to a maximum security penal institution following commitment, denied petitioner equal protection of the laws.*

Following his commitment to the Department, the petitioner was confined in the Wisconsin State Prison, a maximum security penal institution. The petitioner remained at the Wisconsin State Prison from the time of his original commitment until his parole. Persons found to be mentally ill, infirm or deficient, however, are, pursuant to section 51.05, Wis. Stats. (1967), committed to a hospital or training school. Persons committed pursuant to any statutory provision other than the Sex Crimes Act could not be confined at the Wisconsin State Prison.

The fact that the release of one continued under the Sex Crimes Act is determined to be dangerous to the public, does not justify confinement in the State Prison. Those found to be dangerous after civil commitment pursuant to the Mental Health Act are confined at the Central State Hospital. Section 51.21, Wis. Stats. (1967).

While in Wisconsin all state correctional and mental institutions are operated by the Department of Health and

Social Services, this factor does not mean that various institutions cannot be characterized as either penal institutions or mental hospitals. One may be confined in a penal institution only following conviction of a crime. While so confined, one may be transferred to a mental institution pursuant to section 51.21(3), Wis. Stats. (1967). However, no statutes permit the Department to transfer a mentally ill, infirm or deficient patient to the State Prison, or any other penal institution.

It is relevant to note that even persons found to be not guilty by reason of insanity, section 957.11, Wis. Stats. (1967), and persons who become mentally ill, infirm or deficient while serving a penal sentence, section 51.21, Wis. Stats. (1967), are confined in a mental institution. In fact, section 51.21(3)(a), Wis. Stats. (1967) expressly provides for the transfer of a prisoner found to be mentally ill, infirm or deficient to a hospital.

The petitioner submits that for purposes of treatment, the fact that he was committed pursuant to the Sex Crimes Act does not justify his incarceration in a penal institution. The petitioner believes that this Court's holding in *Baxstrom v. Harold*, 383 U.S. 107 (1966), expressly prohibits confinement in a penal institution following commitment to receive specialized treatment for a mental aberration. If it is determined that the defendant may be dangerous to himself or to others or to property, he may be confined at the Central State Hospital where civilly committed patients who are found to be dangerous are confined. However, it is a violation of the Equal Protection Clause to allow one committed because of his mental condition to be incarcerated at a penal institution, when there are no other statutory provisions allowing one committed for a mental condition to be confined in a penal institution.

B. No Relevant Distinction for the Purposes of Classification Exists Between Persons Committed Under the Sex Crimes Act and Those Committed Under the Mental Health Act.

The denial to the petitioner pursuant to the Sex Crimes Act of rights guaranteed to all persons civilly committed under the Mental Health Act, denied petitioner equal protection of the laws, unless there exists relevant distinctions between those persons subject to the respective acts which constitute a reasonable basis for the statutory classification. Petitioner submits that no such distinctions exist.

1. *The difference in mental conditions justifying commitment under the Sex Crimes Act and under the Mental Health Act is not a relevant distinction.*

The fact that the mental state or condition which justifies commitment under the Mental Health Act is more strictly defined than that under the Sex Crimes Act does not constitute such a distinction as to justify a classification which denies procedural rights to the petitioner. To support commitment under the Mental Health Act, it must be shown that the patient is mentally ill, infirm or deficient.

The statutory definitions of these terms are:

> . . . "mental infirmity" means senility. Section 51.001(1), Wis. Stats. (1967).
>
> "Mental illness" means mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community. Section 51.75 Art. II (f), Wis. Stats. (1967).
>
> "Mental deficiency" means mental deficiency as defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of managing himself and his affairs, but shall not include mental illness as defined herein. Section 51.75 Art. II (g), Wis. Stats. (1967).

Under the Sex Crimes Act the initial commitment looks only to whether the defendant suffers from a mental or physical aberration, and if so, whether specialized treatment is recommended. Webster's 3rd International Dictionary (1966 ed.), defines "aberration" to mean "unsoundness of the mind; esp. unsoundness insufficient to constitute insanity." While it is evident that the standard under the Sex Crimes Act is more vague than that under the Mental Health Act, it must be remembered that it is also the Sex Crimes Act which denies the procedural safeguard of a jury trial.

In examining the distinction between the language in the acts concerning mental condition, the District Court for the Western District of Wisconsin properly concluded that such a distinction was irrelevant:

> Since commitment constitutes an independent proceeding, the rule in Baxstrom v. Harold, supra, requires that the offender be given an opportunity to show whether he, in fact, has such mental or physical aberrations. The nature of the mental or physical infirmity is of no significance. The critical question is whether the offender is afflicted by it. *Hill v. Burke* 289 F. Supp. 921, 927 (W.D. Wis. 1968).

2. *The prior conviction of a crime by those committed pursuant to the Sex Crimes Act is not a relevant distinction.*

The fact that the machinery of the Sex Crimes Act is not activated until one has been convicted of a "sex crime" as defined in sections 959.15(1) and (2), Wis. Stats. (1967), is not such a distinction between the acts as may be considered relevant for purposes of classification.

In the absence of the conviction for a "sex crime," one could be committed solely in accordance with the procedures established under the Mental Health Act, which procedures insure the right to demand a jury trial.

In *Baxstrom v. Herold, supra,* this court examined the constitutionality of section 384 of the New York Correction Law which established a procedure for the civil commitment of a mentally ill prisoner at the expiration of his prison term. While the procedures established for the civil commitment of all other allegedly mentally ill persons preserved the right to a jury determination on the issue of their mental condition, section 384 denied this right. In holding that persons committed under section 384 were denied the equal protection of the laws, this Court rejected the state's argument that the variance in procedures was based upon a reasonable classification of persons subject to commitment.

> The director contends that the State has created a reasonable classification differentiating the civilly insane from the "criminally insane," which he defines as those with dangerous or criminal propensities. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. *Walters v. City of St. Louis,* 347 U.S. 231, 237. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.* For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from other civil commitments. *Baxstrom v. Herold, supra,* at 111-112.

As in *Baxstrom v. Herold, supra,* there is no valid distinction between commitments pursuant to the Sex Crimes Act and commitments pursuant to the Mental Health Act which is relevant to the purpose of classification so as to justify the denial of rights granted under the Mental Health Act to

the petitioner. Both acts provide for commitment of an individual to receive specialized treatment for a mental abnormality. The hearing at the initial commitment proceedings under both acts examines whether the individual is suffering from a mental abnormality which, under the Mental Health Act, constitutes mental illness, infirmity or deficiency, and if so, whether the individual is in need of specialized treatment. The sole distinction of any real import is that the Mental Health Act specifically provides that both of these issues will be decided by a jury if demanded by the patient. Section 51.02(5)(d), Wis. Stats. 1967).

In effect, the Sex Crimes Act uses the prior conviction of a crime as a justification for denying rights to some which are available to all other persons not convicted of a crime prior to the initiation of commitment proceedings. This Court's holding in *Baxstrom v. Herold, supra,* expressly prohibits such classifications based solely upon the conviction of a crime. The sole factor that distinguishes the present case from that before the court in *Baxstrom v. Herold, supra,* is that in that case the commitment proceedings were not initiated until the expiration of the penal sentence, while in the present matter the commitment proceedings were initiated subsequent to conviction, but prior to penal sentencing. In both cases, however, the state attempts to make the prior conviction of a crime the basis for denying rights at the commitment proceedings, which proceedings are entirely independent of the original conviction. There is no connection whatsoever between the punishment prescribed by law for the conviction, and possible confinement as a result of commitment.

While the petitioner readily admits that the conviction of a crime is a decision that may subject the offender to penal sanctions prescribed by the legislature, the petitioner strongly contends that such a conviction does not serve as a relevant distinction to deny him rights granted to all other citizens of the state.

It may be noted that persons found not guilty by reason of insanity, section 957.11, Wis. Stats. (1967), are automatically committed. However, even though these individuals have committed a criminal act, they are afforded all rights of persons committed under the Mental Health Act. Though their right to compel judicial reexaminations of their mental condition is limited, section 957.11(4), Wis. Stats. (1967), they are afforded all of the procedural safeguards, including a jury trial, guaranteed by section 51.11, Wis. Stats. (1967).

3. *The determination at the continuation hearing under the Sex Crimes Act that the release of the defendant may be dangerous is not a relevant distinction.*

To justify the continuation of one committed under the Sex Crimes Act it must be determined that his release would be dangerous to the public. It must first be remembered that "dangerousness" is not an issue at the original commitment proceedings. Therefore, even if this were a relevant distinction for the purpose of classification, it would become relevant only after the maximum term prescribed by the legislature for the crime for which the defendant had been convicted, expired. The petitioner submits, however, that the determination that the defendant is dangerous is not a relevant distinction for purposes of classification at any time.

Upon re-examination under the Mental Health Act, or upon the continuation hearing under the Sex Crimes Act, the issues to be decided are whether the individual is suffering from a mental abnormality, which abnormality: (1) Under the Mental Health Act constitutes mental illness, infirmity or deficiency; and (2) Under the Sex Crimes Act makes the release of the individual dangerous to the public. An analysis of the issues presented in the above proceedings shows that one suffering from a mental abnormality that did not constitute mental illness, infirmity or deficiency would not be subject to continued confinement

under the Mental Health Act. This is true even though the release of the individual may be deemed to be dangerous to the public.

However, under the Sex Crimes Act one who is suffering from a mental abnormality and whose release is determined to be dangerous to the public, may continue to be confined. Thus, the sole distinction between continued commitment pursuant to the Sex Crimes Act and continued commitment pursuant to the Mental Health Act is that the Sex Crimes Act considers the dangerousness of the release of the defendant. While the petitioner assumes for the purpose of this Brief that the state may commit those who are found to be mentally abnormal and dangerous, the petitioner does contest the state's right to limit procedural safeguards solely on the basis of alleged dangerousness.

As set forth above, the basis of a distinction based solely on dangerousness was expressly rejected by this Court in *Baxstrom v. Herold, supra.* There, this Court decided that dangerousness could be a relevant distinction only for purposes of determining the custodial or medical care to be given the patient.

In *Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270, 275 (1940), this Court indicated that those found to be dangerous could be confined by the state.

> The class it did select is identified by the state court in terms which clearly show that the persons within the class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control.

However, while the use of dangerousness may be a proper distinction for purposes of classification in determining the state's right to incarcerate citizens, this standard loses all relevancy for purposes of classification when considering rights guaranteed under the Equal Protection Clause and the Due Process Clause.

In *Buchanan v. State,* 41 Wis. 2d 460 (1969), the Wisconsin Supreme Court held that there did exist a valid dis-

tinction relevant to the purpose of classification between persons committed pursuant to the Sex Crimes Act and those committed pursuant to the Mental Health Act. Therefore, it held that the denial of a jury trial to those committed under the Sex Crimes Act was not a denial of the equal protection of the laws. In reviewing the commitment proceedings under both of the acts, the court noted the distinctions which it believed justified its position.

> There are several germane distinctions to the classification, as seen above the most important is a sexual deviate is confined because he is dangerous to the public, and the mentally ill, infirm or deficient person is confined primarily for his own benefit and treatment. *Buchanan v. State, supra,* at 472.

The petitioner submits that the classification based on dangerousness made by the Wisconsin Supreme Court is in direct conflict with this Court's holding in *Baxstrom v. Herold, supra.*

In reality the question is not whether dangerousness is a proper classification for continuation of confinement, but, rather, who shall determine whether one is, in fact, dangerous. It may be remembered that even though the state may imprison those found guilty of a crime, we still require a jury to decide the issue of guilt. A trial by jury is not afforded to only the innocent. Similarly, the state may not afford a jury trial on the issue of continued confinement to only the non-dangerous when the basis for the continued confinement is dangerousness.

> It follows that the State, having made the substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some. *Baxstrom v. Herold, supra,* at 111.

V.

PETITIONER WAS DENIED DUE PROCESS OF LAW.

A. The Denial of a Jury Trial at the Petitioner's Extension Hearing Denied Him Due Process of Law

At the hearing to continue the control of the Department over the petitioner pursuant to section 959.15(14), Wis. Stats. (1967), the petitioner was denied a jury trial. However, due process requires that one be granted the right to a jury trial at any criminal proceeding at which a severe sanction may be imposed.

> . . . the right to a jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. *Duncan v. Louisiana, supra,* at 154.

As both the initial commitment proceedings and the extension hearings under the Sex Crimes Act are criminal proceedings which may result in a severe penalty being imposed, these proceedings required the state to insure to the petitioner the right to a trial by jury.

1. *Commitment proceedings under the Sex Crimes Act are criminal proceedings.*

In *Huebner v. State,* 33 Wis. 2d 505, 526 (1966), the Wisconsin Supreme Court examined the commitment proceedings under the Sex Crimes Act and noted:

> We consider this commitment procedure so essentially different from penal sentencing as to amount to an independent proceeding which determines such important rights of the defendant unrelated to the determination of guilt that due process requires a hearing thereon as much as it does for subsequent hearings on the same issue.

The Sex Crimes Act was subsequently reviewed by the District Court for the Western District of Wisconsin. In *Hill*

v. Burke, 289 F. Supp. 921, 926 (W.D. Wis. 1968) *aff.* 422 F.2d 195 (7th Cir. 1970), the court held:

> I conclude that the commitment procedure under Section 959.15 constitutes neither civil commitment nor a sentencing procedure, but an independent criminal proceeding . . .

The determination of the Wisconsin court and that of the district court are in accordance with the result reached by this Court in *Specht v. Patterson,* 386 U.S. 605 (1967). Here, in considering commitment proceedings pursuant to the Colorado Sex Offenders Act, the Court held that "the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment." *Specht v. Patterson, supra,* at 610. The Court further noted that:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. There is a new finding of fact [citation omitted] that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designated not so much as retribution as it is to keep individuals from inflicting future harm. [citation omitted] *Specht v. Patterson, supra,* at 608-609.

Clearly, commitment proceedings under the Sex Crimes Act constitute an independent criminal proceeding at which a new criminal punishment may be inflicted.

2. *Commitment proceedings under the Sex Crimes Act result in a severe penalty so as to require a jury trial.*

In *Huebner v. State,* 33 Wis. 2d 505, 525-526 (1966), the Wisconsin court examined the consequences of a commitment under the Sex Crimes Act and stated:

> If the report [of the Department of Health and Social Services] recommends treatment, the court must commit the defendant to the Department either on a probation status so that he can be treated on an inpatient or an outpatient basis or must commit the defendant to the Department for treatment at its sex deviate facilities with a deprivation of his liberty for that purpose. Significantly too this finding automatically determines the initial maximum period of incarceration or mandatory treatment and *in addition subjects the defendant to potential continuing incarceration and treatment under the Sex Crimes Act.* [emphasis added]

There can be no doubt that both the initial commitment and each extension under the Wisconsin Sex Crimes Act constitute severe penalties when it is realized that such commitments subject one to the possibility of life confinement in a maximum security prison.

In *Duncan v. Louisiana, supra,* at 159, this Court stated:

> . . . the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough subject the trial to the mandates of the Sixth Amendment.

Subjecting one to the possibility of life imprisonment is surely a penalty which requires the safeguards of a jury trial.

In examining commitment pursuant to statutes similar to the Wisconsin Sex Crimes Act, courts have determined that these proceedings result in criminal punishment. See, *Specht v. Patterson, supra.*

In *Commonwealth v. Page,* 159 N.E.2d 82, 85 (1959), the Massachusetts court examined the consequences of commitment under a statute providing for the confinement of sex offenders and held:

> But to be sustained as a nonpenal statute, in its application to the defendant, it is necessary that the

> remedial aspect of confinement thereunder have foundation in fact. It is not sufficient that the Legislature announce a remedial purpose if the consequences to the individual are penal. While we are not now called upon to state the standards which such a center must observe to fulfill its remedial purpose, we hold that a confinement in a prison which is undifferentiated from the incarceration of convicted criminals is not remedial so as to escape constitutional requirements of due process.

It must be conceded in the present matter that the petitioner was confined in the Wisconsin State Prison, undifferentiated from those serving penal sentences.

In *United States v. Maroney*, 355 F.2d 302, 309-310 (3rd Cir. 1966), the court, when considering confinement under Pennsylvania's Barr-Walker Act, reached a result similar to that of the Massachusetts court.

> It is true that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review. But it is no less a criminal proceeding and no less the infliction of criminal punishment because the Act provides for such studies, especially when this is accompanied by the drastic potential of life imprisonment if they do not affirmatively provide a basis for release. This criminal punishment does not lose its characteristics because the Act goes beyond simple retribution. "It would be archaic to limit the definition of 'punishment' [under the Bill of Attainder Clause] to 'retribution'. Punishment serves several purposes; retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment." Unites States v. Brown, 381 U.S. 437, 458, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). See also, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); Case Comment, 32 U. Chic. L. Rev. 290, 294-298 (1965).

Clearly, the legislature cannot deny due process of law under the guise of treatment.

> The effort of enlightened penology to alleviate the condition of a convicted defendant by providing some element of advanced, modern methods of cure and rehabilitation and possible ultimate release on parole cannot be turned about so as to deprive a defendant of the procedures which the due process clause guarantees in a criminal proceeding. *United States v. Maroney, supra,* at 310.

Both the initial commitment and the continuation proceedings under the Sex Crimes Act constitute independent criminal proceedings at which a severe penalty may be imposed.

As stated by the court in *United States v. Maroney, supra,* at 312:

> It [commitment pursuant to the Colorado Sex Offenders Act] is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. See *Specht v. Patterson, supra.*

In *Duncan v. Louisiana, supra,* this Court concluded that the Due Process Clause of the Fourteenth Amendment required the right to trial by jury be afforded by the States to all persons subjected to a severe penalty at a criminal proceeding.

Petitioner requests this Court to consider the practical effect of commitment and continuation under the Sex Crimes Act. As a result of his commitment, petitioner was incarcerated for three years in the Wisconsin State Prison, and is now subject to parole and further continuation of

his commitment. The crime for which petitioner was originally convicted carried a maximum sentence of one year in the county jail. The conclusion that commitment under the Sex Crimes Act results in a severe criminal penalty is inescapable.

Although this Court ruled in *DeStefano v. Woods*, 392 U.S. 631 (1968), that the holding in *Duncan v. Louisiana, supra*, was to have only prospective application, the petitioner may still avail himself the rights expressed therein. Petitioner's hearing for continuation of control was commenced on July 23, 1968, whereas the holding in *Duncan v. Louisiana, supra*, became incumbent upon the states in all trials commencing after May 20, 1968.

In *Buchanan v. State, supra*, the Wisconsin Supreme Court refused to apply this Court's holding in *Duncan v. Louisiana, supra*, to proceedings under the Sex Crimes Act. The Wisconsin court held that all procedural safeguards mentioned in *Specht v. Patterson, supra*, were afforded the defendant by section 959.15(14), Wis. Stats. (1967), and went on to distinguish the application of *Duncan v. Louisiana, supra*, by stating: (1) That that decision insured the right to trial by jury during only the guilt determining process; and (2) That commitment under the Sex Crimes Act was not criminal punishment but was, rather, for the purposes of treatment and for the protection of the public.

The most fundamental safeguard of our system of criminal justice administration is the jury trial. In *Duncan v. Louisiana, supra*, this Court noted the historical protections afforded by the jury trial and realized that jury trials are "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana, supra*, at 158.

The jury trial is a safeguard reserved not only for the determination of guilt or innocence, but also for the determination of any factual issue from which a severe criminal penalty may result. The determination under the Sex Crimes Act that the release of the defendant would be dan-

gerous to the public, which determination is necessary to continue control over the defendant, is indeed a factual determination from which severe criminal penalties may result.

In holding that due process was satisfied because the requirements, as set forth in *Specht v. Patterson, supra,* were met, the Wisconsin court failed to view due process as a viable concept which is constantly changing. Since the decision in *Specht v. Patterson, supra,* this Court has broadened due process to include the right to trial by jury. Therefore, the Wisconsin court's application of due process to continuation proceedings must insure not only the safeguards at the time of the decision in *Specht v. Patterson, supra,* but also those additional safeguards subsequently determined to be necessary to guarantee due process.

Thus, due process equally demands a jury trial on the determination of commitment and continuation under the Sex Crimes Act, just as a jury trial is demanded in the determination of the issue of guilt.

B. The Failure to Provide the Petitioner with Adequate Legal Representation at the Continuation Hearing Denied the Petitioner Due Process of Law.

At the continuation hearing, the petitioner was represented by court appointed counsel. As shown in both the transcript of proceedings at the continuation hearing [A. 29-34], and in the order of the County Court of Waukesha County confirming the order continuing control over the defendant [A. 14-15], the petitioner was, in fact, denied effective, competent or adequate representation.

Prior to the continuation hearing the petitioner, on advise of his attorney, refused to submit to an examination by a doctor or psychiatrist of his own choosing. [A. 32]. The petitioner's attorney requested leave of court to file a brief challenging the constitutionality of the Sex Crimes Act. [A. 33-34]. The petitioner's attorney did not, in fact, file such a brief, even after correspondence of the court was directed to her that:

> . . . the absence of the filing of Briefs and any affirmative acts for and on behalf of the defendant with regard to this matter, the Court would presume that the defendant did not intend to offer any proof as to his condition, and that the order of extension as entered by the State Department of Health and Social Services would stand; and
>
> Accordingly, on this 20th day of November, 1968, there having been no further offer of evidence or correspondence from the defense counsel, the Court will dismiss the motion and confirm the order of the State Department of Health and Social Services, directing that the defendant be detained for further treatment, pursuant to statute. Order of County Court, Bjork, J. [A. 14-15].

Petitioner contends that the above facts clearly establish "that the representation was of such low competence as to constitute no reasonable representation at all." *Cross v. State*, 45 Wis. 2d 593.603 (1969). Therefore, the petitioner was denied counsel in violation of due process and in violation of the provisions of section 959.15(14), Wis. Stats. (1967).

VI.

ON ITS FACE THE SEX CRIMES ACT DENIES DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A. The Sex Crimes Act Does Not Allow One to Challenge Whether He is Within the Purview of the Act.

One becomes subject to the provisions of the Sex Crimes Act upon the commission of a specified sex crime as defined in section 959.15(1), Wis. Stats. (1967), or upon the conviction of any "sex crime" other than those specified in subsection (1). For the purposes of the statute, "sex crime" is defined to mean:

> "Sex Crime" as used in this subsection includes any crimes except homicide or attempted homicide if the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime; and for that purpose the court may in its discretion take testimony after conviction if necessary to determine that issue. Section 959.15(2), Wis. Stats. (1967).

The Sex Crimes Act places no obligation upon the court to take any testimony or receive any evidence concerning the question of whether the defendant was motivated by a desire for sexual excitement in the commission of the crime. Similarly, there is no provision enabling the defendant to introduce evidence to establish his motivation in the commission of the crime, or to rebut the unilateral determination of the court. Nowhere does the Sex Crime Act provide for the review of the court's decision that the commission of the crime was probably directly motivated by a desire for sexual excitement. Thus, the defendant is brought within the purview of the Sex Crimes Act, and the increased penalties incidental thereto, with no guarantee of a hearing on whether he is, in fact, subject to the act's provisions. Such a procedure affords no protection against arbitrary action by the judge. It must be remembered that:

> . . . the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. *Duncan v. Louisiana, supra,* at 156.

The critical importance of this determination is evidenced by the case now before this Court. The petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a fine of not more than $500.00 or imprisonment in the county jail for not more than one year or both, Section 947.15(1), Wis. Stats. (1967). However, upon the unreviewable decision of the court, the petitioner was brought within the purview of the Sex Crimes

Act and subjected to the possibility of life imprisonment. Presently, the Sex Crimes Act would permit even one convicted of disorderly conduct to be imprisoned for life without any right to contest the initial decision that the commission of the crime was motivated by a desire for sexual excitement.

The finding that the crime was sexually motivated is an additional finding of fact completely unrelated to the criminal conviction. This new and additional finding is critical to the rights of the defendant and requires review with all of the safeguards of due process.

> This new finding alone authorized and required the indeterminate sentence of imprisonment for a minimum term of one day and a maximum term of life, instead of the maximum term of imprisonment for five years which is prescribed for assault with intent to ravish. This is much enlarged punishment for an essentially independent criminal offense. See Comment, 13 U. Pitts. L. Rev. 739, 741-742 (1952).
>
> The same factors, i.e. imposition of greater punishment than that provided for conviction of a constituent element after an additional finding of fact, led the Supreme Court to hold in Chandler v. Fretag, 348 U.S. 3, 75 S. Ct. 1; 99 L. Ed. 4 (1954) and Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), that the habitual offenders acts there involved, which provided for increase criminal punishment because of prior convictions, created essentially independent criminal offenses. This required that the determination of the issue of fact involved in the statutory proceedings must conform to the constitutionally guaranteed safeguards of due process in substantive criminal trials. *United States v. Maroney, supra,* at 311.

The hearing at the initial commitment examines only the questions of: (1) Is the defendant suffering from physical and mental aberration; and, if so, (2) Is specialized treatment recommended by the Department. *Huebner v. State,*

supra, at 529. There is no safeguard afforded the defendant to contest the finding of the trial judge concerning the motivation in the commission of the crime.

It is of interest to note that the procedures for the initiation of commitment proceedings under the Mental Health Act do not, at any point, involve a unilateral determination as to the applicability of those procedures to any specific individual. Under the Mental Health Act, commitment proceedings may be initiated by written application of at least three adult residents of the state, one of whom must be a person with whom the patient resides or at whose home he may be or a parent, child, spouse, brother, sister or friend of the patient, or the sheriff or a police officer or public welfare or health officer. Section 51.01(1), Wis. Stats. (1967). In essence, the petition states that the signers believe the patient to be mentally ill, infirm or deficient. At the hearing afforded the patient, the issue to be determined is precisely that alleged in the written application of the petitioners, i.e. is the patient mentally ill, infirm or deficient.

Petitioner contends that at the initial commitment hearing under the Sex Crimes Act for a crime other than those specifically enumerated in Section 959.15(1), Wis. Stats. (1967), the proper issues for determination are: (1) Was the commission of the crime for which the defendant was convicted motivated by a desire for sexual excitement and, if so, (2) Is the defendant suffering from a mental or physical aberration for which specialized treatment is recommended. The current denial to the defendant of the right to contest whether he is within the purview of the Sex Crimes Act constitutes a denial of due process.

B. On Its Face the Sex Crimes Act Denies One the Right to Trial By Jury.

As previously discussed, section 959.15(14), Wis. Stats. (1967) denies one the right to a trial by jury at both the original commitment and at all continuation proceedings.

Because proceedings under the Sex Crimes Act constitute independent criminal proceedings from which a severe penalty may flow, *Duncan v. Louisiana, supra,* requires that the defendant be afforded the right to a trial by jury. As the Sex Crimes Act denies this right, the act is unconstitutional on its face.

CONCLUSION

For the reasons stated this Court should grant a writ of habeas corpus to the petitioner and declare section 959.15, Wis. Stats. (1967), to be unconstitutional on its face.

Respectfully submitted,

Irvin B. Charne
Attorney for Petitioner

APPENDIX

Relevant Provisions of the Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Wisconsin Sex Crimes Act, sec. 959.15, Wis. Stats. (1967).

(1) Rape and related crimes; commitment for presentence examination. If a person is convicted under s. 944.01, 944.02 or 944.11 or under s. 939.32 for attempting to violate s. 944.01 or 944.02, the court shall commit him to the state department of public welfare for a presentence social, physical and mental examination. The court and all public officials shall make available to the department upon its request all pertinent data in their possession in respect to the case.

(2) Other sex crimes. If a person is convicted of any sex crime other than those specified in sub. (1), the court may commit him to the department for such a presentence examination, if the department certifies that it has adequate facilities for making such examination and is willing to accept such commitment. The court and all public officials shall make available to the department upon its request all pertinent data in their possession in respect to the case. "Sex crime" as used in this subsection includes any crime except homicide or attempted homicide if the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime;

and for that purpose the court may in its discretion take testimony after conviction if necessary to determine that issue.

(3) Transportation. When the court commits a person to the department in accordance with sub. (1) or (2) for presentence examination, the court shall order him conveyed by the proper county authorities at the sole expense of the county, to some place of detention approved or established by the department.

(4) Report of examination. Upon completion of the examination, but not later than 60 days after the date of the commitment order, a report of the results of the examination and the recommendations of the department shall be sent to the court.

(5) Sentence imposed. If it appears from such report that the department does not recommend specialized treatment for his mental and physical aberrations, the court shall order the proper county authorities to bring him before the court at county expense and shall sentence him in the manner provided by law.

(6) Commitment to the department. If it appears from said report that the department recommends specialized treatment for his mental or physical aberrations, the court shall order the proper county authorities to bring him before the court at county expense and shall either place him on probation under the provisions of ch. 57 with the requirement as a condition of such probation, that he receive outpatient treatment in such manner as the court shall prescribe, or commit him to the department under this section. If he is committed to the department the court shall order him conveyed by the proper county authorities, at the expense of the county to the sex deviate facility, established by the department.

(7) The effect of appeal from a judgment of conviction. (a) The right of a convict to appeal from the judgment of conviction is not affected by this section.

(b) If a person who has been convicted and committed to the department appeals from a conviction, the execution of the commitment to the department shall not be stayed by the appeal except as provided in par. (c).

(c) If the commiting court is of the opinion that the appeal was taken in good faith and that the question raised merits review by the appellate court, or when there has been filed with the court a certificate that a judge of an appellate court is of the opinion that questions have been raised that merit review, the judge of the court in which the person was convicted, or in the case of his incapacity to act, the judge by whom the certificate was filed, may direct that such person be left at liberty under such conditions as in the judge's opinion will insure his submission to the control of the department at the proper time if it is determined on the appeal that the department is entitled to custody.

(8) Notice of commitments; treatment, transfer, use of other facilities. (a) If a court commits a person to the department it shall at once notify the department of such action in writing.

(b) The department shall then arrange for his treatment in the institution best suited in its judgment to care for him. It may transfer him to or from any institution to provide for him according to his needs and to protect the public. The department may irrespective of his consent require participation by him in vocational, physical, education and correctional training and activities; may require such modes of life and conduct as seem best adapted to fit him for return to full liberty without danger to the public; and may make use of other methods of treatment and any treatment conducive to the correction of the person and to the prevention of future violations of law by him.

(c) The department may make use of law enforcement, detention, parole, medical psychiatry, educational, correctional, segregative and other facilities, institutions and agen-

cies, public or private, within the state. The department may enter into agreements with public officials for separate care and special treatment (in existing institutions) of persons subject to the control of the department under this section. Nothing herein contained shall give the department control over existing institutions or agencies not already under its control, or give it power to make use of any private agency or institution without its consent.

(d) Placement of a person by the department in any institution or agency not operated by the department, or his discharge by such institution or agency, shall not terminate the control of the department over him. No person placed in such institution or agency may be released therefrom except to the department or after approval of such release by the department.

(9) Periodic examination. The department shall make periodic examinations of all persons within its control under this section for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding one year. The department shall keep written records of all examinations and of conclusions predicated thereon, and of all orders concerning the disposition or treatment of every person under its control. Failure of the department to examine a person committed to it or to make periodic examination shall not entitle him to a discharge from the control of the department, but shall entitle him to petition the committing court for an order of discharge, and the court shall discharge him unless it appears in accordance with sub. (13) that there is necessity for further control.

(10) Parole. Any person committed as provided in this section may be paroled if it appears to the satisfaction of the department after recommendation by a special review board, appointed by the department (a majority of whose

members shall not be connected with the department) that he is capable of making an acceptable adjustment in society. The department may promulgate regulations for parole, revocation of parole, and the supervision of parolees.

(11) Duration of control. The department shall keep every person committed to it under this section under its control and shall retain him, subject to the limitations of sub. (12), under supervision and control, so long as in its judgment such control is necessary for the protection of the public. The department shall discharge any such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public, but no person convicted of a felony shall, without the written approval of the committing court, be discharged prior to 2 years after the date of his commitment.

(12) Termination of control. Every person committed to the department who has not been discharged from its control as provided in sub. (11) unless the department has previously thereunto made an order directing that he remain subject to its control for a longer period and has applied to the committing court for a review of said order as provided in sub. (13) shall be discharged at the expiration of the maximum term prescribed by law for the offense for which he was convicted, subject to the provisions of s. 53.11, or at the expiration of one year, whichever is greater. For the purposes of this subsection, sentence shall begin at noon of the day of commitment by the court to the department.

(13) Continuance of control; order and application for review by the committing court. If the department is of the opinion that discharge of a person from its control at the time provided in sub. (12) would be dangerous to the public for reasons set forth in sub. (14), it shall make an order directing that he remain subject to its control beyond that period; and shall make application to the committing court for a review of that order at least 90 days before the time of discharge stated.

(14) Action of committing court upon application for review; reasons for continuance of control by the department. (a) If the department applies to the committing court for the review of an order as provided in sub. (13); the court shall notify the person whose liberty is involved, and, if he be not sui juris, his parent or guardian as practicable, of the application, and shall afford him opportunity to appear in court with counsel and of process to compel the attendance of witnesses and the production of evidence. He may have a doctor or psychiatrist of his own choosing examine him in the institution to which he is confined or at some suitable place designated by the department. If he is unable to provide his own counsel, the court shall appoint counsel to represent him. He shall not be entitled to a trial by jury.

(b) If, after a hearing, the court finds that discharge from the control of the department of the person to whom the order applies would be dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality the court shall confirm the order. If the court finds that discharge from the control of the department would not be dangerous to the public for the causes stated, the court shall order that he be discharged from the control of the department at the time stated in the original commitment.

(15) Review by court of subsequent orders of the department. (a) When an order of the department is confirmed as provided in sub. (14), the control of the department over the person shall continue, but unless he is previously discharged, the department shall within 5 years after the date of such confirmation make a new order and a new application for review thereof in accordance with this section. Such orders and applications may be repeated as often as in the opinion of the department it may be necessary for the protection of the public.

(b) Every person shall be discharged from the control of the department at the termination of the periods stated

in par. (a) of this subsection unless the department has previously acted therein as required, and shall be discharged if the court fails to confirm the order as provided in sub. (14).

(c) During any such period of extended control, but not oftener than semiannually, the person may apply to the court for a re-examination of his mental condition and the court shall fix a time for hearing the same. The proceeding shall be as provided in sub. (14).

(16) Appeal from judgment of committing court. (a) If under the provisions of this section the court affirms an order of the department, the person whose liberty is involved may appeal to the proper appellate court for a reversal or modification of the order. The appeal shall be taken in the manner provided by law for appeals to said court from the judgment of an inferior court.

(b) At the hearing of an appeal the appellate court may base its judgment upon the record, or it may upon its own motion or at the request of either the appellant or the department refer the matter back for the taking of additional evidence.

(c) The appellate court may confirm the order of the lower court, or modify it, or reverse it and order the appellant to be discharged.

(d) Pending appeal the appellant shall remain under the control of the department.

(17) Voluntary admission to diagnostic institutions; treatment. Any person believing himself to be afflicted by a physical or mental condition which may result in sexual action dangerous to the public may apply upon forms prescribed by the department for voluntary admission to some institution which provides diagnosis for such persons. If the application is approved and he is admitted by the department, he shall be given a complete physical and mental examination. If it appears upon the examination that he is afflicted by a physical or mental condition that may prove dangerous to the public, such fact shall be certified to him

and to the department. If he desires treatment, he may apply for admission to an institution designated by the department and upon approval of his application, he may be received in the designated institution and shall there receive the treatment indicated by his condition. If he is unable to defray all or a part of the cost of his care and treatment, he shall be required to do that. If he desires to leave the institution he must give 5 days' written notice to the superintendent of the institution of his intention to leave. The department may provide outpatient treatment for him at his expense.

(18) Conflict of provisions; effect. All statutes conflicting with this section are superseded to the extent of the conflict and the provisions of this section shall prevail over conflicting provisions heretofore enacted.

Relevant Sections of the Wisconsin Mental Health Act, Ch. 51, Wis. Stats. (1967).

51.01 Procedure to determine mental condition. (1) APPLICATION TO COURT. (a) Written application for the mental examination of any person (herein called "patient") believed to be mentally ill, mentally infirm or mentally deficient, and for his commitment, may be made to the county court of the county in which the patient is found, by at least 3 adult residents of the state, one of whom must be a person with whom the patient resides or at whose home he may be or a parent, child, spouse, brother, sister or friend of the patient, or the sheriff or a police officer or public welfare or health officer. However, if the patient is under 18 years of age, the application shall be made to the juvenile court of the county in which such minor is found.

(b) If the judge of the county court is not available, the application may be made to any court of record of the county.

(2) APPOINTMENT OF EXAMINING PHYSICIANS. (a) On receipt of the application the court shall appoint 2 duly licensed reputable physicians to personally examine the patient, one of whom, if available, shall be a physician with special training in psychiatry, and who are so registered by the court on a list kept in the clerk's office, and neither of whom is related by blood or marriage to the patient or has any interest in his property. The court may, by attachment for the person of the patient, compel him to submit to the examination of the physicians at a specified time and place.

(b) The examining physicians shall personally observe and examine the patient at any suitable place and satisfy themselves as to his mental condition and report the result to the court, in writing, at the earliest possible time or the time fixed by the court.

(3) FORMS. The department shall prescribe forms for the orderly administration of ch. 51 and furnish such forms to the county courts and to the several institutions. A substantial compliance with prescribed forms is sufficient.

(4) REPORT OF EXAMINING PHYSICIANS. The examining physicians, as part of their report, shall make and file substantially the following affidavit:

We,_____ and _____, the examining physicians, being severally sworn, do certify that we have with care personally examined [insert name of person examined] now at _____ in said county, and as a result of such examination we hereby certify (a) that he is mentally ill [or mentally infirm or mentally deficient] or that he is not mentally ill [or mentally infirm or mentally deficient]; and (b) that he is [or is not] a proper subject for custody and treatment; that our opinion is based upon the history of his case and our examination of him; that the facts stated and the information contained in this certificate and our report are true to the best of our knowledge and belief. We informed the patient that he was examined by us as to his mental condition, pursuant to an application made therefor, and of his right to be heard by the court.

51.02 Procedure to determine mental condition (continued). (1) NOTICE OF HEARING. (a) On receipt of the application or of the report of the examining physicians, the court shall appoint a time and place for hearing the application and shall cause notice thereof to be served upon the patient under s. 262.06 (1) or (2), which notice shall state that application has been made for the examination into his mental condition (withholding the names of the applicants) and that such application will be heard at the time and place named in the notice; but if it appears to the satisfaction of the court that the notice would be injurious or without advantage to the patient by reason of his mental condition, the service of notice may be omitted. The court may, in its discretion, cause notice to be given to such other persons as it deems advisable. If the notice is served the court may proceed to hold the hearing at the time and place specified therein; or, if it is dispensed with, at any time, the court may, by attachment for the person of the patient, cause him to be brought before the court for the hearing.

(b) The court shall determine whether the patient is a war veteran. If he is, the court shall promptly notify the state department of veterans' affairs, and in the event of commitment, it shall notify the nearest U.S. veterans' administration facility of the commitment.

(2) HEARING. At the hearing any party in interest, upon demand made to the judge a reasonable time in advance of the hearing, may examine the physicians and other witnesses, on oath, before the court and may offer evidence. At the opening of the hearing the judge shall state to the patient, if present, in simple, nontechnical language the purpose of the examination and his right to be heard and to protest and oppose the proceedings and his commitment; but where it is apparent to the judge that the mentality of the patient is such that he would not understand, he may omit such statement. The hearing may be had in the courtroom or elsewhere, and shall be open only to per-

sons in interest and their attorneys and witnesses. Before making the court's decision the judge shall personally observe the patient.

(3) DISTRICT ATTORNEY TO HELP. If requested by the judge, the district attorney shall assist in conducting proceedings under this chapter.

(4) APPOINTMENT OF GUARDIAN AD LITEM. At any stage of the proceedings, the court may, if it determines that the best interest of the patient requires it, appoint a guardian ad litem for him.

(5) COURT'S DECISION. At the conclusion of the hearing the court may:

(a) Discharge the patient if satisfied that he is not mentally ill or infirm or deficient so as to require care and treatment, or

(b) Order him detained for observation if in doubt as to his mental condition, or

(c) Order him committed if satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and treatment, or

(d) In case of trial by jury, order him discharged or committed in accordance with the jury verdict.

51.03 Jury trial. If a jury is demanded by the alleged mentally ill, infirm or deficient patient or by a relative or friend in his behalf, before commitment, the court shall direct that a jury of 6 people be drawn to determine the mental condition of the patient. The procedure shall be substantially like a jury trial in a civil action. The judge may instruct the jurors in the law. No verdict shall be valid or received unless agreed to and signed by at least 5 of the jurors. At the time of ordering a jury to be summoned, the court shall fix the date of the hearing, which date shall be not less than 30 days nor more than 40 days after the demand for a jury is made. In the meantime the court may order the patient temporarily detained in a designated pub-

lic institution, until the date of hearing, for observation. The court shall submit to the jury the following form of verdict:

State of Wisconsin)
) ss
_____County)

Members of the Jury:

(1) Do you find from the evidence that the patient _____ (insert his name) is mentally ill or mentally inform or mentally deficient? Answer "Yes" or "No."

Answer: . . . . . .

(2) If you answer the first question "Yes," then do you further find from the evidence that said patient is a proper subject for custody and treatment? Answer "Yes" or "No."

Answer: . . . . . .

(Signatures of jurors who agree)

51.11 Re-examination of patients. (1) Except as otherwise provided in ss. 51.21, 957.11 and 957.13, any person adjudged mentally ill or infirm or deficient, or restrained of his liberty, because of alleged mental illness or infirmity or deficiency, may on his own verified petition or that of his guardian or some relative or friend have a re-examination before any court of record, either of the county from which he was committed or in which he is detained.

(2) The petition shall state the facts necessary to jurisdiction, the name and residence of the patient's general guardian, if he has one, and the name, location and superintendent of the institution, if the person is detained.

(3) The court shall thereupon appoint 2 disinterested physicians, each having the qualifications prescribed in s. 51.01, to examine and observe the patient and report their findings in writing to the court. For the purpose of such examination and observation the court may order the patient confined in a convenient place as provided in s. 51.04.

(3a) If the patient is under commitment to a hospital, a notice of the appointment of the examining physicians and a copy of their report shall be furnished to such hospital by the court.

(4) Upon the filing of the report the court shall fix a time and place of hearing and cause reasonable notice to be given to the petitioner and to the hospital and to the general guardian of the patient, if he has one, and may notify any known relative of the patient. The provisions of s. 51.02, so far as applicable, shall govern the procedure.

(5) If the court determines that the patient is no longer in need of care and treatment it shall enter judgment to that effect and order his discharge; if it shall not so determine, it shall order him returned under the original commitment, except that if he is at large on conditional release or leave, the court may permit him so to continue. If a jury trial is demanded, the procedure shall, as near as may be, be the same as in s. 51.03, and the court's order or determination shall be in accordance with the jury's verdict.

(6) All persons who render services in such proceedings shall receive the same compensation and all expenses of such proceedings shall be paid and adjusted as provided in section 51.07.

(7) When a proceeding for retrial or re-examination is not pending in a court of record and a jury trial is not desired by the persons authorized to commence such proceeding, the department may, on application, determine the mental condition of any patient committed to any institution under this chapter, and its determination shall be recorded in the county court of the county in which the patient resides or from which he was committed, and such determination shall have the same effect as though made by the county court. The department may also, with or without application, if it has reason to doubt the mental illness or infirmity of any such patient, require the court of the county from which he was committed or in which he is detained to determine his mental condition pursuant to this section.

(8) Subsequent re-examinations may be had at any time in the discretion of the court but may be compelled after one year of the preceding one.

HUMPHREY *v.* CADY, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 70-5004. Argued December 7, 1971—Decided March 22, 1972

Petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum sentence of one year. In lieu of sentence, he was committed to the "sex deviate facility" in the state prison, for a potentially indefinite period, pursuant to the Wisconsin Sex Crimes Act. That Act provides that when a court finds that a convicted person was "probably motivated by a desire for sexual excitement," it may commit the defendant to the Department of Health and Social Services for a social, physical, and mental examination, and if the Department recommends specialized treatment, the court must hold a hearing on the need therefor. If the State establishes the need for treatment, the court must commit the defendant for treatment in lieu of sentence for a period equal to the maximum sentence authorized for the crime. At the end of that period the Department may petition for a renewal of the commitment for five years. After notice and hearing, the court may renew the commitment if it finds that discharge would be "dangerous to the public." Further five-year renewals may be similarly obtained. Petitioner is subject to a five-year renewal order, obtained at the expiration of his one-year sentence. He challenges the original and renewal commitment procedures. He argues that commitment for compulsory treatment under the Sex Crimes Act, at least after the original commitment, is essentially equivalent to commitment under Wisconsin's Mental Health Act, which provides for jury determinations, and that his commitment without jury action deprives him of equal protection of the laws. He also claims that he was denied effective assistance of counsel at both hearings and the opportunity to be present and to confront the State's witnesses at the renewal hearing. He charges equal protection and due process violations as a result of his commitment to state prison rather than to a mental hospital, as provided by the Mental Health Act. At the renewal hearing his counsel argued that a new commitment would constitute double jeopardy and indicated a broad constitutional challenge to the Sex Crimes Act. However, no further action on petitioner's behalf was taken. The District Court dis-

missed his habeas corpus petition on the grounds that his claims were lacking in merit and that they had been waived by failure to present them adequately to the state courts. The Court of Appeals refused to certify probable cause for an appeal, on the ground that the claims were frivolous. *Held:*

1. Petitioner's claims are substantial enough to warrant an evidentiary hearing. *Baxstrom* v. *Herold*, 383 U. S. 107; *Specht* v. *Patterson*, 386 U. S. 605. Pp. 508–514.

(a) The renewal proceedings bear substantial resemblance to the post-sentencing proceedings in *Baxstrom*, *supra*, and the Wisconsin Supreme Court has held that even the initial commitment is not just a sentencing alternative but an independent commitment for treatment, comparable to commitment under the Mental Health Act. Pp. 508–511.

(b) The Mental Health Act and the Sex Crimes Act are apparently not mutually exclusive, and an equal protection claim would be persuasive if it develops on remand that petitioner was deprived of a jury determination or other procedural protections merely by the arbitrary decision to seek commitment under one Act rather than the other. P. 512.

(c) Remand will provide ample opportunity to develop facts relevant to respondent's claim of mootness as well as to petitioner's other constitutional claims. Pp. 512–514.

2. Federal habeas corpus is not barred by every state procedural default, and an evidentiary hearing is required to determine whether petitioner knowingly and intelligently made a deliberate strategic waiver of his claims in state court. Pp. 514–517.

Reversed and remanded to District Court.

MARSHALL, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Irvin B. Charne, by appointment of the Court, 402 U. S. 927, argued the cause and filed briefs for petitioner.

George L. Frederick, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief were *Robert W. Warren*, Attorney General, and *Mary V. Bowman*, Assistant Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum sentence of one year. Wis. Stat. Ann. § 947.15 (1958). In lieu of sentence, he was committed to the "sex deviate facility," located in the state prison, for a potentially indefinite period of time, pursuant to the Wisconsin Sex Crimes Act. Wis. Stat. Ann. § 959.15 (1958), as amended, Wis. Stat. Ann., c. 975 (1971). In this petition for federal habeas corpus, he seeks to challenge the constitutional validity of the statutory procedures for commitment and the conditions of his confinement. The District Court dismissed his petition without an evidentiary hearing, on the ground that (1) his claims were for the most part lacking in merit as a matter of law, and (2) his claims had been waived by his failure to present them adequately to the state courts. The Court of Appeals refused to certify probable cause for an appeal, 28 U. S. C. § 2253, relying not on the ground of waiver but solely on the ground that the claims lacked merit.[1] We granted certiorari to consider the constitutional challenge to the statute. 401 U. S. 973 (1971). We have concluded that an evidentiary hearing is necessary to resolve petitioner's constitutional claims, and also to resolve the question of waiver; consequently we remand the case to the District Court for a hearing.[2]

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[1] The Court of Appeals said in pertinent part:

"Plaintiff also claims various procedural rights to which he would be entitled in the course of a separate proceeding for conviction of an offense, but the continuation of commitment is not such proceeding." App. 58.

[2] After the petition for certiorari had been filed, it appears that petitioner was released on parole to the custody of the Secretary of the State Department of Health and Social Services. That change

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The Wisconsin Sex Crimes Act provides that after a person is convicted of any crime, the court may consider whether the crime was "probably directly motivated by a desire for sexual excitement." If the court finds such motivation, it may commit the defendant to the Department of Public Welfare (now the Department of Health and Social Services) for a social, physical, and mental examination. If the Department recommends specialized treatment for the defendant's "mental and physical aberrations," the court must hold a hearing on the need for such treatment. If the State establishes the need for treatment by a preponderance of the evidence, the court must commit the defendant to the Department for treatment in lieu of sentence, for a period equal to the maximum sentence authorized for the defendant's crime. At the end of that period, the Department may petition for an order renewing the commitment for five years. After notice and hearing, the court may renew the commitment if it finds that the defendant's discharge would be "dangerous to the public because of [his] mental or physical deficiency, disorder or abnormality." Further five-year renewals may be similarly obtained without limitation.

Petitioner is presently subject to a five-year renewal order, obtained at the expiration of his one-year maximum sentence. His principal claims relate to the procedure that resulted in the order renewing his commitment. In addition, he challenges the original commitment procedures, and the conditions of his confinement.

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in his custody does not necessarily moot his claims; it simply requires the substitution of the Secretary for the prison warden as respondent, which can be accomplished by motion under Rule 49 of this Court, or by the District Court on remand.

A review of petitioner's claims compels us to conclude that they are at least substantial enough to warrant an evidentiary hearing, in light of this Court's decisions in *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), and *Specht* v. *Patterson*, 386 U. S. 605 (1967). Thus we reject the contrary conclusion of the Court of Appeals, implicit in its decision to deny leave to appeal.

A. One of petitioner's principal arguments is that commitment for compulsory treatment under the Sex Crimes Act, at least after the expiration of the initial commitment in lieu of sentence, is essentially equivalent to commitment for compulsory treatment under Wisconsin's Mental Health Act, Wis. Stat. Ann., c. 51 (1957); that a person committed under the Mental Health Act has a statutory right to have a jury determine whether he meets the standards for commitment, Wis. Stat. Ann. § 51.03; and that petitioner's commitment under the Sex Crimes Act without such a jury determination deprived him of equal protection of the laws.

In *Baxstrom*, substantially the same argument was advanced by a convicted prisoner who was committed under New York law for compulsory treatment, without a jury trial, at the expiration of his penal sentence. This Court held that the State, having made a jury determination generally available to persons subject to commitment for compulsory treatment, could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few. 383 U. S., at 110–112. The Court recognized that the prisoner's criminal record might be a relevant factor in evaluating his mental condition, and in determining the type of care and treatment appropriate for his condition; it could not, however, justify depriving him of a jury determination on the basic question whether he was mentally ill and an appropriate subject for some kind of compulsory treatment.

Since 1880, Wisconsin has relied on a jury to decide whether to confine a person for compulsory psychiatric treatment.[3] Like most, if not all, other States with similar legislation, Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty.[4] In making this determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.[5]

[3] The jury-trial provision first appeared in c. 266, Wis. Laws 1880, pp. 299, 301; compare Wis. Rev. Stat. § 593, p. 208 (1878), with Wis. Rev. Stat. § 593, p. 114 (1883 Supp.).

[4] The Mental Health Act authorizes commitment of a person for compulsory treatment if the court or jury finds that he is (1) mentally ill, and (2) a "proper subject for custody and treatment." Wis. Stat. Ann. §§ 51.02 (5), 51.03 (1957). The social and legal aspects of the determination are implicit not only in the determination of who is a "proper subject for custody and treatment," but also in the definition of mental illness itself, contained in the Interstate Compact on Mental Health, and recently adopted by Wisconsin, as well as by many other States:

"'Mental illness' means mental disease *to such extent* that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." (Emphasis added.) Wis. Stat. Ann. § 51.75, Art. II (f) (Supp. 1971).

[5] In 1926 the Wisconsin Legislature voted to eliminate the jury-trial provision from the Mental Health Act, at the request of the state medical society, but the Governor vetoed the bill. Again in 1947 an attempt was made to eliminate the jury trial. A legislative committee reported that juries too often refused to order commitment when the medical experts thought it appropriate. Wis. Stat. 1947, c. 51, general comment of interim committee, at 802. This time the state legislature refused to do away with jury trials, however, and indeed when the legislature enacted in that same year a

Commitment for compulsory treatment under the Wisconsin Sex Crimes Act appears to require precisely the same kind of determination, involving a mixture of medical and social or legal judgments.[8] If that is so (and that is properly a subject for inquiry on remand), then it is proper to inquire what justification exists for depriving persons committed under the Sex Crimes Act of the jury determination afforded to persons committed under the Mental Health Act.

Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, and is limited

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new statute for the compulsory treatment of "sex psychopaths," the new statute contained a provision for jury trial paralleling the provision in the Mental Health Act. Wis. Stat. 1947, § 51.37 (4). Not until 1951, with the passage of a new Sex Crimes Act, did the provision for jury trial disappear from the legislation governing the compulsory treatment of sex offenders. Wis. Stat. 1951, § 340.485 (14) (a).

[8] The Sex Crimes Act authorizes an initial commitment of an otherwise eligible person for compulsory treatment if the court finds that he is in need of "specialized treatment for his mental or physical aberrations," Wis. Stat. Ann. § 975.06 (1)–(2) (1971), which restated Wis. Stat. Ann. § 959.15 (5)–(6), adding a provision for a judicial hearing, as required by the Wisconsin Supreme Court in *Huebner* v. *State*, 33 Wis. 2d 505, 147 N. W. 2d 646 (1967). The statute authorizes renewal of the commitment order if the court finds that discharge would be "dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality." Wis. Stat. Ann. § 975.14 (1971), formerly Wis. Stat. Ann. § 959.15 (14) (b) (1958).

in duration to the maximum permissible sentence.[7] The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime. The renewal orders bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom*. Moreover, the Wisconsin Supreme Court has expressly held that even the initial commitment under the Sex Crimes Act is not simply a sentencing alternative, but rather an independent commitment for treatment, comparable to commitment under the Mental Health Act. The Wisconsin court held, anticipating this Court's decision in *Specht* v. *Patterson*, 386 U. S. 605 (1967), that a hearing was required even for the initial commitment under the Sex Crimes Act. *Huebner* v. *State*, 33 Wis. 2d 505, 521–530, 147 N. W. 2d 646, 654–658 (1967). While the *Huebner* decision was grounded in considerations of procedural due process, the Wisconsin court also noted carefully the relevance of *Baxstrom* and the Equal Protection Clause to its decision.[8]

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[7] Two courts of appeals have implied the contrary, see *Matthews* v. *Hardy*, 137 U. S. App. D. C. 39, 420 F. 2d 607 (1969), cert. denied, 397 U. S. 1010 (1970), and *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (CA2), cert. denied, 396 U. S. 847 (1969). This case does not present the claim of right to a jury trial at the initial commitment, however, and we intimate no view on that question here. Petitioner's only objections to the initial commitment are discussed *infra*, at 513.

[8] Following *Huebner*, petitioner rests his claim alternatively on *Specht* and the Due Process Clause, or on *Baxstrom* and the Equal Protection Clause. The Wisconsin Supreme Court has, however, rejected the argument that either *Baxstrom* or *Huebner* requires the State to extend to sex offenders the right to a jury trial at the

An alternative justification for the discrimination might be sought in some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary. It appears, however, that the Mental Health Act and the Sex Crimes Act are not mutually exclusive; that "aberrations" warranting commitment under the latter might also amount to "mental illness" warranting commitment under the former.[9] The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other.[10]

B. The remand hearing will also provide an opportunity for the District Court to consider factual questions relevant to petitioner's other claims. In addition to the lack of a jury trial, petitioner challenges several other aspects of the hearing that led to the renewal of his commitment. He claims he was denied effective assistance of counsel, and he was denied the opportunity to be present and to confront the State's witnesses. These claims are tied inextricably to the

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hearing on the petition for renewal of commitment. *Buchanan* v. *State*, 41 Wis. 2d 460, 164 N. W. 2d 253 (1969). In rejecting the equal protection claim, the court relied on distinctions so elusive that, if they can support the discrimination at all, they will require further factual development at the remand hearing in this case. The jury question was also raised, but not decided, in *Hill* v. *Burke*, 289 F. Supp. 921 (WD Wis. 1968), aff'd, 422 F. 2d 1195 (CA7 1970).

[9] Tr. of Oral Arg. 22; Respondent's Supplemental Memorandum, filed Feb. 25, 1971, pp. 3–4. Compare the criteria for commitment in n. 4 with the criteria in n. 6, *supra*.

[10] *Baxstrom* v. *Herold*, *supra*, at 111; *Cross* v. *Harris*, 135 U. S. App. D. C. 259, 262, 418 F. 2d 1095, 1098 (1969); *Millard* v. *Harris*, 132 U. S. App. D. C. 146, 152, 406 F. 2d 964, 970 (1968).

question of possible waiver of rights at that hearing, a question that clearly requires further exploration on remand, see *infra*, at 514–517.

Petitioner also challenges the adequacy of the hearing that led to his initial commitment. The record shows that petitioner was not represented by counsel at that initial commitment, App. 11–12, and thus the question arises whether the state court ever in fact held the hearing required by *Huebner* and *Specht*, and now by statute as well. Moreover, petitioner claims that, even if there was such a hearing, it provided at most an opportunity to challenge the finding that he needed treatment, and not an opportunity to challenge the initial determination that his crime was sexually motivated, a determination that was a necessary prerequisite to the invocation of the whole commitment process. Respondent argues that any defect in the initial commitment has been rendered moot by the intervening renewal hearing.[11] It may be, however, that the initial commitment has continuing effects that cannot be remedied by a mere attack on the subsequent renewal order.[12] On remand, the District Court should resolve this threshold question of mootness, and if the Court determines that the merits of these claims are properly before it, then it should proceed to resolve the relevant factual and legal questions.

[11] See *State ex rel. Stroetz* v. *Burke*, 28 Wis. 2d 195, 136 N. W. 2d 829 (1965).

[12] For example, if petitioner can successfully challenge the initial finding that his crime was sexually motivated, then his commitment under the Sex Crimes Act would be improper even if he meets the statutory standards for continued commitment, *i. e.*, even if his discharge would be "dangerous to the public because of . . . mental or physical . . . abnormality." In that case, he could properly be committed only under the Mental Health Act, in accordance with its procedures and criteria for commitment, and its conditions of confinement.

Finally, petitioner challenges the place and character of his confinement under the Sex Crimes Act. He objects to the fact that he was committed to the state prison, rather than to a mental hospital, as he would have been under the Mental Health Act; and he contends that no treatment was provided at the prison, notwithstanding the fact that he was in a prison unit labeled "Sex Deviate Facility." These matters, in his view, deprived him of equal protection and due process. Respondent argues that this aspect of petitioner's claim has become moot, because (1) petitioner has been released on parole, see n. 2, *supra*, and (2) the State has established a new treatment facility at the state mental hospital, to which petitioner might be committed if his parole were revoked.[11] On remand, the parties will have ample opportunity to develop the facts relevant to the question of mootness, as well as to petitioner's substantial constitutional claims.

II

Plainly, then, we cannot accept as a ground for decision the conclusion of the Court of Appeals that petitioner's claims are too frivolous to require a hearing. An alternative ground was relied on by the District Court, however, and respondent presses that argument here. The District Court held that petitioner had waived his constitutional claims by failing to present them properly to the state courts. In order to consider this argument, it will be necessary to review the somewhat complicated procedural history of this case.

Petitioner first sought to challenge the constitutionality of the Sex Crimes Act at the hearing on the State's petition to renew his commitment beyond the initial one-year period. His appointed counsel argued that

[11] See Brief for Respondent 28–30, and Appendix to Brief 140–156.

a new commitment order would constitute a prohibited second punishment for a single offense, and indicated that she was making a broad constitutional challenge to the Sex Crimes Act. The state trial judge adjourned the matter to permit the parties to brief the constitutional issues. When petitioner's counsel failed to submit a brief, or to take any further action on behalf of petitioner, the state court concluded that the bare petition of the Department of Public Welfare was sufficient to support an order continuing petitioner's confinement.[14] No appeal was taken from that order.[15]

Petitioner subsequently filed a petition for habeas corpus, without the assistance of counsel, in the Wisconsin Supreme Court, which at that time was the only state court authorized to grant habeas corpus relief to state prisoners.[16] The petition was summarily dismissed without a response from the State or an opinion by the court. While the petition is not in the record before us, both parties represent that it was substantially identical to the subsequent petition for federal habeas corpus that initiated the present proceedings.[17]

The federal petition, also prepared without the as-

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[14] The state court relied largely on petitioner's failure to introduce any evidence in his behalf. In this connection it is noteworthy that the record does not show any evidence introduced by the State, either; moreover, under Wisconsin law, the State has the burden of proof in such proceedings. *Goetsch* v. *State*, 45 Wis. 2d 285, 172 N. W. 2d 688 (1969) (decided after the commitment hearing in this case).

[15] An appeal is authorized by Wis. Stat. Ann. § 975.16, formerly Wis. Stat. Ann. § 959.15 (16).

[16] Wis. Stat. Ann., c. 292 (1958), which has been replaced by a comprehensive post-conviction review statute, Wis. Stat. Ann. § 974.06 (1971).

[17] On remand, the District Court will have the opportunity to ascertain precisely what claims were presented in the state habeas petition.

sistance of counsel, alleges, in addition to the claim of double jeopardy, a claim that petitioner was denied equal protection and due process, referring specifically to, *inter alia*, the lack of a jury trial, and confinement in the state prison.

The District Court held that the failure of petitioner's trial counsel to file a brief in the state trial court amounted to a deliberate strategic decision to abandon petitioner's constitutional claims; it justified the Wisconsin Supreme Court's denial of post-conviction relief; and it operated as a bar to federal relief as well. We cannot agree with respondent or the District Court that the present record shows the deliberate bypass of state remedies that might bar federal consideration of petitioner's claims. We conclude, however, that respondent should be given an opportunity to develop the relevant facts. Accordingly, the case must be remanded for an evidentiary hearing on this point, as well as on the merits of such claims as may be ripe for federal determination.

This Court has repeatedly made it plain that not every state procedural default bars federal habeas corpus relief. Title 28 U. S. C. §§ 2254 (b)–(c), which require a state prisoner to exhaust available state remedies, are limited in their application to those state remedies still open to the habeas applicant at the time he files his application in federal court. *Fay* v. *Noia*, 372 U. S. 391, 434–435 (1963); see *Picard* v. *Connor*, 404 U. S. 270, 272 n. 3 (1971). In this case it appears that petitioner has met the requirements of the exhaustion rule, inasmuch as no direct appeal is presently available to him, and he has taken his claim for post-conviction relief to the highest state court.[18]

[18] There is, of course, no requirement that petitioner file repetitious applications in the state courts. *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Brown* v. *Allen*, 344 U. S. 443, 448 n. 3 (1953). The

This Court has also held, however, that a federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts, on the ground that in so doing he has forfeited his state court remedies. *Fay* v. *Noia*, *supra*, at 438–439. But such a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel. An evidentiary hearing will ordinarily be required before the District Court can determine whether petitioner made a deliberate strategic waiver of his claim in state court. In this case, a hearing is necessary to determine (1) the reason for counsel's failure to file a brief or to take further action in the state courts, and (2) the extent of petitioner's knowledge and participation in that decision. If the District Court cannot find persuasive evidence of a knowing and intelligent waiver on the part of petitioner himself, then the Court should proceed to consider petitioner's constitutional claims.

The judgment is reversed and the case is remanded to the District Court for further proceedings in accordance with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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question on remand is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim; and if so, whether there is presently available a state forum in which he can effectively present the claim.

Moreover, some or all of petitioner's claims may be entitled to be treated as claims for relief under the Civil Rights Act, 42 U. S. C. § 1983, in which case no exhaustion is required. *Wilwording* v. *Swenson*, *supra*.